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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KEITH EDWARD WOODHOUSE, Defendant and Appellant.	H040443 (Santa Clara County Super. Ct. No. C1198468)

Following a jury trial, defendant Keith Edward Woodhouse was convicted of committing 30 lewd or lascivious acts on a child under the age of 14 years. (Pen. Code § 288, subd. (a).)[1] The charged crimes involved nine young girls. The jury also found true 30 multiple-victim allegations, one attached to each count, which required alternative sentencing. (§ 667.61, subds. (b), (e)(4), see § 667.61, subd. (c)(8).) The trial court sentenced defendant to a total term of 30 years to life.

On appeal, defendant claims that the trial court erroneously denied his motion to exclude his statements made during police questioning because he did not knowingly,

[1] All further statutory references are to the Penal Code unless otherwise specified. To protect the privacy of the minor victims, we generally refer to them by their first initials. But the names of four girls who were victims of charged offenses begin with the letter "M." As to those four victims, we refer to the two girls with very similar first names as "Big M." and "Little M." according to their respective ages and to the other two girls by the first two letters of their names, "Ma." and "Mo." As to the two girls whose names begin with the letter "E.," we refer to the victim of count 14 by the initial "E." and to the victim of an uncharged offense by the first two letters of her name, "El."

voluntarily, and intelligently waive his *Miranda* rights.[2] He also asserts that the trial court erred by admitting evidence pursuant to Evidence Code section 1108. Finally, he raises a claim of cumulative error.[3]

We affirm the judgment.

I

Evidence

An abbreviated statement of the facts follows. All the lewd and lascivious acts of which defendant was convicted took place at a particular preschool or elementary school site during programs run by the Child Development Center (CDC) for which defendant was working.

Detective Erik Martin

Erik Martin was a detective in the sexual assault unit of the San Jose Police Department and the lead investigator in this case. Detective Martin telephoned defendant and told defendant that he was working on a CDC human resources issue. The detective asked defendant whether he would be willing to come in and speak to the detective. The detective did not tell defendant that he was a suspect in the case, although he was. Defendant made an appointment and came into the police department for an interview in January 2011.

Detective Martin escorted defendant to the interview room, which was approximately eight feet square and had no windows. Inside was a small table and several chairs. The door to the room did not lock.

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*)

[3] This court granted defendant's motion to withdraw "Argument III" from the opening brief filed May 12, 2015.

The interview, which was over two hours, was videotaped. At the outset, Detective Martin advised defendant of his rights pursuant to *Miranda*. The videotape of the interview was played for the jury.

Following defendant's formal arrest, Detective Martin suggested to defendant that he "explain the why [he did it] in an apology letter." The apology letter written by defendant was introduced into evidence.

The January 26, 2011 Interview of Defendant

Although defendant did not initially admit wrongdoing during the January 26, 2011 interview conducted by Detective Martin, defendant eventually made incriminating statements.

Early in the interview, defendant told Detective Martin that he was on unpaid suspension. The detective asked defendant to speculate about which child might have complained of inappropriate touching by him.

Defendant recalled an incident that occurred in December 2010 while playing tag. It involved I., a seven-year-old girl. He accidently tagged her "on the bum," and "they started saying that, 'Oh you touched . . .' " "[O]ther children started saying it," and the situation "got a little out hand." Defendant also named various other girls as possible complainants.

Well into the interview, defendant admitted that he touched K. under her underwear just one time, and explained that he "just kinda slipped" and that he touched "just the buttocks skin." He guessed that it was possible that he touched her vagina. He indicated that the incident with K. occurred at the art table sometime after Halloween and before Christmas. She was sitting on his lap. He admitted touching "just a little bit" under her underwear.

Defendant ultimately admitted that the first touching at the CDC had occurred during the previous October and involved K. He estimated that he had touched K. "10-ish" times.

In naming other girls, ages five to seven years, who attended the CDC programs where he had worked, defendant mentioned C. Defendant eventually admitted that he touched C. a couple of times down her skirt. He said that he touched the small of her back and the top of her buttocks.

Defendant acknowledged that Ma. had sat on his lap and that something had possibly happened with her. When the detective asked where it had happened "if you did [something]," defendant said, "[P]robably outside." Defendant later admitted touching Ma. outside her clothing and under her waistband.

Defendant admitted that he had touched "around like five" girls at the CDC program. The girls that he named included K., A.,[4] S., a second grader named M. (Big M.), and a kindergartener named M. (Little M.).

Defendant indicated that the touching of A. occurred outside and was "another lap sitting." He indicated that he touched her "just around the waist and he "didn't go on the underwear . . . ."

Defendant indicated that the touching of S. occurred in the book area. Defendant later admitted touching S.'s vagina while they were reading a book in the book area.

Defendant admitted touching Big M. once. He indicated the touching probably occurred in the "big kid room" on the couch.

Defendant acknowledged that once, twice, or three times he had hugged Little M. lower than the waist. Defendant admitted that he "touch[ed] around the buttocks area." The detective asked, "Okay. Feels good be honest?" Defendant answered, "Yeah." The detective asked, "[I]s it arousing?" Defendant replied, "[S]ometimes."

At one point, the detective said that, "if they're sitting on you, you're gonna have an erection." Defendant said, "Right." When asked whether he hid it or "just let it be," defendant said he did not "really do anything."

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[4] None of the charges in this case involved A.

Defendant also admitted other uncharged conduct. He admitted touching El., who was a four-year-old preschooler while he was reading to her. He touched her buttocks skin, but not her vagina.

Defendant acknowledged that a number of years ago, he had worked at a church day camp, and he had been dismissed after a lifeguard said something. Defendant eventually disclosed that there had been a seven-year-old girl camper, whom he named. According to defendant, she liked him and hung out with him a lot. Although the camp had a strict no-lap-sitting policy, the girl sat on his lap every day. She hung out with him in the swimming pool. Defendant claimed that he never went under her swimsuit, but he admitted that he touched her on "the buttocks and stuff like that."

When the detective later asked defendant to explain "why" he had touched the girls, defendant stated, "[I] couldn't stop myself."

K.—Counts 1 to 10 (*September 1, 2010 - January 19, 2011*)

K. attended the elementary school from August or September 2010 through January 2011. In the fall of 2010, K. had just turned six years old and was in first grade. At least three days a week, K. attended an afterschool CDC program at the elementary school. When she began the CDC program, defendant was a teacher.

In January 2011, K. was reporting a lot of stomach aches to her mother. She was very nervous about going to school. K. told her mother that defendant was touching her inappropriately. K. was extremely embarrassed, and she was crying. The next morning, K. showed her mother, using her mother's hand, what defendant had done. He had put his hand inside her panties in the back and touched her skin in the buttocks area.

K. indicated to her mother that defendant had inappropriately touched her hundreds of times and that the touching had occurred at the art table where she sat on defendant's lap. K. said that she was not the only one; it was happening to other girls. She told her mother that she heard another girl who was sitting in defendant's lap say, "No, Stop it. Stop it."

During an interview on January 20, 2011, K. told Detective Martin that a teacher named Keith was touching her "private part." She did not want to see defendant because she knew it was going to happen again. K. said that defendant touched the parts of her body where she went "pee" and where she went "poo." It happened at the art table while she was sitting on defendant's lap. She said that no one was looking under the table and that was "how he could hide it." He touched her skin under her panties.

In preliminary hearing testimony read to the jury,[5] K. indicated that defendant had touched her "private" inside her clothes at the art table in the art room while she was sitting on defendant's lap. Defendant touched her almost every time she went to school. K. tried to keep her legs closed to prevent him from touching her, but defendant pulled her legs apart.

K. saw defendant touch Little M.'s front "private," which is used to go "pee-pee," and Little M. was very mad. Little M. was saying "stop."

C.—*Count 11* (*August 1, 2010 - January 19, 2011*)

C. attended the elementary school and the CDC program there from August 2010 to January 2011. She was five and a half years old in the fall of 2010 and attended kindergarten. She went to the CDC program every day after school. "Mr. Keith" was a teacher in the CDC afternoon program. "Mr. Keith" put his hand down her pants, and his hand made skin-to-skin contact with her bottom. This happened while C. was sitting next to him on a bench by the playground. She recalled saying, "Can you please stop." He stopped and said, "Sorry." The incident happened before her family got their Christmas tree that year.

S.—Count 12 (*August 1, 2010 - January 19, 2011*)

From August 2010 until January 2011, S. attended the elementary school. She was five years old and in kindergarten. S. also attended the CDC afterschool program

[5] K. was found to be unavailable to testify at trial.

there on weekdays. Defendant was a teacher whom she saw almost every day at the CDC program.

Defendant touched S.'s tummy lots of times while reading a book to her. He also touched S. under her clothes while he was reading to her. He put his hand on her buttocks.

Ma.—Count 13 (*August 1, 2010 - January 19, 2011*)

Ma. attended the elementary school. Between August 2010 and January 2011, Ma. attended the CDC afterschool program there every day. At that time, she was six years old.

Defendant was a teacher at the CDC program, and he was almost always there. Defendant touched her buttocks under her clothing. He started by rubbing her back, and then reached down with one hand under her pants. She was outside when it happened.

K., another girl who went to the CDC program, disclosed to Ma. that defendant had touched her.

E.—Count 14 (*August 1, 2010 - January 19, 2011*)

E. attended the preschool Monday through Friday between August 2010 and January 2011. E. turned five years old during December 2010. Defendant was a teacher at the preschool.

While E. was in bed during naptime at preschool, defendant reached his hand under the blankets and her clothes; he touched her vaginal area and buttocks. When defendant was touching her, he was sitting on the floor next to her bed.

Big M.—Counts 15 to 21 (*August 1, 2010 - January 19, 2011*)

From August or September 2010 until January 2011, Big M. attended the elementary school and the CDC program at the school. During that period, she was seven years old and in second grade. Big M. sometimes went to the CDC program in the morning before school, and she usually went to the CDC program after school every day. Defendant was a teacher there.

Big M. estimated that defendant touched her buttocks over her clothes probably 40, or close to 45, times with his hand. The touching happened when defendant hugged her after school.

I.—Counts 22 to 28 (*August 1, 2010 - January 19, 2011*)

From August 2010 through January 2011, I. attended the elementary school and, both before and after school, she went to the CDC program, where defendant was a teacher. I. turned seven in August 2010.

Defendant touched I.'s bottom over her clothes almost every day. He put his hand on her back and slid it down to her buttocks. When I. was out on the playground, he touched her "butt." He touched her buttocks after playing tag, and I. said to other children, "Mr. Keith is touching my butt." When I. told defendant to stop touching her "butt," defendant told her not to say the word "butt."

I. saw defendant touch Big M.'s "butt" and Little M.'s "butt" multiple times.

Mo.—Count 29 (*August 1, 2010 - January 19, 2011*)

In the fall of 2010 until January 2011, Mo. attended the preschool Monday through Friday. She was then four years old. Defendant was one of her teachers.

After Mo.'s mother learned of the investigation and spoke with a detective, she conducted a videotaped interview of Mo. in which Mo. showed her mother how defendant touched her. His hand slid under the waistband of her pants and touched her buttocks under her clothes.

During a subsequent interview with a detective in February 2011, Mo. disclosed that defendant touched her underwear and that he touched her "kitty cat," which was her name for the part of a girl's body used to go "pee." He touched her "kitty cat" and "tummy" four times.

Mo. testified at the preliminary hearing that defendant had touched her vaginal area, which she called her "kitty cat," and her "butt." She was wearing clothes when he

had touched those places, and he had touched her under her clothes and underwear. Defendant was sitting on the floor next to her bed, and he put his hand under her blanket.

At trial, Mo. affirmed that defendant touched her on her "butt" at school during nap time, which she took on a little bed on the floor with a pillow and a blanket. He was sitting next to her, and he touched her under her blanket.

Little M.—Count 30 (*August 1, 2010 - January 19, 2011*)

Little M. attended the elementary school from August 2010 to January 2011. Every day after school, she went to the CDC program there. During that period she was five years old and in kindergarten.

Defendant was Little M.'s teacher at the CDC program. She remembered him touching her privates, her vaginal area and buttocks, with his hand under her clothes. It happened in various places, while they were coloring at a table, playing, or on the playground. Defendant touched her a lot; he touched her skin underneath her clothes with his hands.

Little M. saw defendant touching Big M.

Evidence of Uncharged Conduct at a Church Day Camp

Two former lifeguards of a church day camp testified regarding defendant's conduct at the camp's swimming pool during a day in the summer of 2007. The camp's director testified regarding defendant's ensuing dismissal.

Bridgette Panico worked as a lifeguard and a swim instructor at the church day camp during the summer of 2007 when she was 22 years old. Jessica Zambataro was also a lifeguard at the church camp during the summer of 2007 when she was 21 years old. During the summer of 2007, defendant was a counselor at the camp.

During that summer, Panico observed defendant in the shallow end of the pool; he had several six-year-old or seven-year-old girls around him, hanging on him, or sitting in his lap. Panico heard a girl sitting in defendant's lap say, "Something is poking my butt." The girl then jumped off defendant.

At some point the same day, Zambataro saw defendant holding up a little girl, whom she believed to be in second grade, in the pool; the girl's back was touching defendant's chest. Defendant subsequently got out of the pool with an erection.

That day, after observing conduct by defendant, Panico and Zambataro had spoken with each other, and one of them had made an announcement at the pool regarding the rule against hanging on counselors.

At some point the same day, Panico and Zambataro saw a girl lie on top of defendant who was lying face down on his stomach on a platform outside the pool. Zambataro spoke with defendant regarding acceptable conduct.

Panico and Zambataro wrote reports before going home that day or close in time to the incident. Both reports indicated that, after stating the rule against children hanging on counselors, a girl had asked if she could hang on defendant. Defendant had said no but he could hold her, and he had put her on his lap.

Mary Griffith was the director of the day camp during the summer of 2007. Zambatara spoke to her about an incident involving defendant having an erection. Defendant was dismissed for insubordination because he failed to follow the camp rules. A camp rule prohibited counselors from allowing children to sit on their laps or hang on them. Griffith did not make a report to police or child protective services. She did not think having an erection by a pool was reportable.

Child Sexual Abuse Accommodation Syndrome

An expert testified regarding Child Sexual Abuse Accommodation Syndrome, which concerns general patterns of behavior of victims of child sexual abuse. She explained that her role was not to provide an opinion about the facts of this particular case.

II

Discussion

A. *Statements Following Miranda Warnings*

1. *Proceedings Below*

In his motion below, defendant argued that he was in custody for purposes of *Miranda* and that, although Detective Martin informed defendant of his *Miranda* rights, the detective downplayed the importance of *Miranda* warnings and the seriousness of the interview. Defendant maintained that the government could not prove that he knowingly, voluntarily, and intelligently waived his *Miranda* rights because his statements were obtained by means of fraud, trickery, deceit and false promises of leniency. No mention was made of Detective Martin's comparative physical size.[6]

At the hearing below, the prosecutor argued that defendant was not in custody until a substantial part of the interview was complete and defendant was arrested and, in any case, defendant understood the *Miranda* advisements and impliedly waived his rights by answering the detective's questions. The trial court determined that this was "not an interrogation under the Fifth Amendment" and, regardless, the detective had administered a valid *Miranda* warning. It found no evidence of coercion or impermissible promises of leniency. It concluded that defendant's statement during the interview and his written apology letter would be admissible in evidence at trial.

2. *Governing Law*

"The Fifth Amendment, which applies to the States by virtue of the Fourteenth Amendment, *Malloy v. Hogan* (1964) 378 U.S. 1, 6, provides that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.' U.S. Const., Amdt. 5.

[6] In response to questioning during the interview, defendant said he weighed about 130 pounds and was about 5 feet 7 or 8 inches tall. At trial, Detective Martin stated that he weighed 280 pounds at the time of the interview and he was 6 feet 4 inches tall.

In *Miranda v. Arizona* (1966) 384 U.S. 436, the Court adopted a set of prophylactic measures to protect a suspect's Fifth Amendment right from the 'inherently compelling pressures' of custodial interrogation. *Id*., at 467." (*Maryland v. Shatzer* (2010) 559 U.S. 98, 103 (*Maryland*).)

In determining whether a person is in custody for purposes of *Miranda*, "the initial step is to ascertain whether, in light of 'the objective circumstances of the interrogation,' [citation] a 'reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.' [Citation.]" (*Howes v. Fields* (2012) 565 U.S. __, __ [132 S.Ct. 1181, 1189] (*Howes*); see *People v. Kopatz* (2015) 61 Cal.4th 62, 80 (*Kopatz*).) "[I]n order to determine how a suspect would have 'gauge[d]' his 'freedom of movement,' courts must examine 'all of the circumstances surrounding the interrogation.' [Citation.] Relevant factors include the location of the questioning [citation], its duration [citation], statements made during the interview [citations], the presence or absence of physical restraints during the questioning [citation], and the release of the interviewee at the end of the questioning [citation]." (*Howes, supra,* 565 U.S. at p. __ [132 S.Ct. at p. 1189].) "[W]hether a suspect is 'in custody' is an objective inquiry." (*J.D.B.* v. *North Carolina* (2011) 564 U.S. 261, 270 (*J.D.B.*); see *Kopatz, supra,* at p. 80.)

"To counteract the coercive pressure, *Miranda* announced that police officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney. [Citation.]" (*Maryland, supra,* 559 U.S. at pp. 103-104.) A suspect must also be told that "anything he says can be used against him in a court of law," and that "if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (*Miranda, supra,* 384 U.S. at p. 479.) "[The United States Supreme] Court has not dictated the words in which the essential information must be conveyed. [Citations.]" (*Florida v. Powell* (2010) 559 U.S. 50, 60.) "The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.' [Citation.]" (*Duckworth v. Eagan* (1989) 492 U.S. 195, 203.)

"After the warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease. [Citation.] Similarly, if the suspect states that he wants an attorney, the interrogation must cease until an attorney is present. [Citation.] Critically, however, a suspect can waive these rights. [Citation.]" (*Maryland, supra,* 559 U.S. at p. 104.)

"[I]f a suspect makes a statement during custodial interrogation, the burden is on the Government to show, as a 'prerequisit[e]' to the statement's admissibility as evidence in the Government's case in chief, that the defendant 'voluntarily, knowingly and intelligently' waived his rights. [Citations.]" (*J.D.B., supra,* 564 U.S. at pp. 269-270, fn. omitted.) " 'The prosecution bears the burden of demonstrating the validity of the defendant's waiver by a preponderance of the evidence.' [Citations.]" (*People v. Williams* (2010) 49 Cal.4th 405, 425 (*Williams*).)

"Although there is a threshold presumption against finding a waiver of *Miranda* rights [Citation], ultimately the question becomes whether the *Miranda* waiver was knowing and intelligent under the totality of the circumstances surrounding the interrogation. [Citations.]" (*People v. Cruz* (2008) 44 Cal.4th 636, 668.) "The waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception' (*Moran v. Burbine* (1986) 475 U.S. 412, 421), and knowing in the sense that it was 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' (*Ibid.*)" (*People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 219.)

"On review of a trial court's decision on a *Miranda* issue, we accept the trial court's determination of disputed facts if supported by substantial evidence, but we independently decide whether the challenged statements were obtained in violation of *Miranda*. [Citation.]" (*People v. Davis* (2009) 46 Cal.4th 539, 586 (*Davis*); see *Williams, supra,* 49 Cal.4th at p. 425.)

3. *Analysis*

In this case, defendant was asked whether he would be willing to come into the police department and speak to Detective Marin. Although the questioning took place at the police department, defendant agreed to come in. He was not under any physical restraints during the interview. The interview room was well lighted, and the questioning took place across a small table. Detective Martin was the only other person in the room. The detective was not in uniform, and he did not behave in a hostile or menacing manner; rather, he spoke in a calm and conversational way. A reasonable person would have not have believed he was in custody when the interview began.

The interview lasted over two hours, but there were a number of breaks when the detective left the room. Defendant was offered beverages, and he received cups of water. The detective expressed appreciation for defendant's honesty.

As the questioning continued, it became apparent that defendant was the focus of the accusations of inappropriate touching. Defendant made many incriminating statements. Defendant was eventually told that the girls had already spoken to Detective Martin. Even though the interview became custodial at some point no later than defendant's formal arrest, we conclude that defendant received proper *Miranda* warnings and he impliedly waived his *Miranda* rights.

At the beginning of the interview at the police department, Detective Martin gave complete *Miranda* warnings to defendant. After each *Miranda* advisement, the detective asked defendant whether he understood; defendant responded yes each time.[7] After

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[7] The following exchange took place:
"MARTIN: [Y]ou have the right to remain silent. Do you understand? . . . Yes-yes or no would be great.
"WOODHOUSE: Yes.
"MARTIN: Okay. Anything you say may be used against you in court. Do you understand?
"WOODHOUSE: Yes.
(continued)

giving the *Miranda* warnings, Detective Martin indicated that the advisements would protect both of them, and he said in part, "I just want to make sure you understand your rights. Okay? Not a big deal. . . ." Defendant stated, "Well usually the *Miranda*'s read for arrested [*sic*]." The detective asked, "Have you been arrested?" Defendant replied no.

Detective Martin indicated that the Hollywood version was not accurate. He stated: "Hollywood basically . . . they pull somebody over. The guy takes off runnin'. He jumps over a fence." The detective continued: "They jump over the fence. They send their dogs at 'em. And while they're beating' on him they're reading him his rights. . . . [T]hat's Hollywood's version. . . . [M]y version is . . . I need to ask you some questions. And . . . I need to make sure that you understand your constitutional rights." Defendant said, "Right." The detective said, ". . . right? Okay?" Defendant replied, "Yes, understand, yes." Defendant said, "Good. Okay. I'm really nervous." Detective Martin said, "Oh I'm sorry. Am I makin' you nervous?" Defendant replied no.

"[The California Supreme Court] has long recognized that a defendant's decision to answer questions after indicating that he or she understands the *Miranda* rights may support a finding of implied waiver, under the totality of the circumstances. (*People v. Whitson* (1998) 17 Cal.4th 229, 247-248, citing cases.)" (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1269.) Defendant expressed his understanding of each *Miranda* right as he was advised of it.

The record does not reflect any reason to believe defendant did not understand the *Miranda* warnings given. Defendant was a 25-year-old, English-speaking man with

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"MARTIN: You have the right to the presence of an attorney before and during any questioning. Do you understand?
"WOODHOUSE: Yes.
"MARTIN: And if you cannot afford an attorney, one will be appointed to you free of charge before any questioning, if you want. Do you understand all those things?
WOODHOUSE: Yes."

some work experience and some post-secondary education. Prior to the accusations, he had been employed. During the interview, defendant indicated that he was only three units shy of completing the coursework required for an early childhood credential.

Defendant nevertheless contends that Detective Martin misled him regarding whether *Miranda* rights applied to his situation by telling him, in essence, that "he need not take the advisements seriously because he had not been arrested and his circumstances were different than the 'Hollywood version' where . . . the *Miranda* [rights] are required." He argues that "a reasonable person in [his] situation would have believed that the advisements were irrelevant and inapplicable because he was not facing the 'Hollywood version' where the warnings were applicable because they were required."

We reject defendant's characterization of his exchange with the detective. Detective Martin indicated that *Miranda* rights are given not only in the dramatized situation where a fleeing suspect is apprehended, but also where an officer needs to ask questions. He stated that he needed to make sure that defendant understood his constitutional rights, and defendant confirmed that he understood them. Contrary to defendant's claims, the detective did not deceive defendant "about whether he was even protected by *Miranda*" or misrepresent that *Miranda* rights applied in limited circumstances not applicable to him.

The California Supreme Court has agreed with "the proposition that evidence of police efforts to trivialize the rights accorded suspects by the *Miranda* decision—by 'playing down,' for example, or minimizing their legal significance—may under some circumstances suggest a species of prohibited trickery and weighs against a finding that the suspect's waiver was knowing, informed, and intelligent." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1237.) Detective Martin did not, however, minimize the legal significance of the *Miranda* warnings or suggest that the assistance of a lawyer was unnecessary. During the course of the interview, defendant asked Detective Martin

whether he was going to need a lawyer. The detective told defendant that he had to make his own decisions. Defendant continued answering questions.

"A waiver may be knowing and intelligent in the sense that there was awareness of the right to remain silent and a decision to forego that right, but yet not knowing and intelligent in the sense that the tactical error of that decision was not perceived. But this is no bar to an effective waiver for *Miranda* purposes, for it 'is not in the sense of shrewdness that *Miranda* speaks of "intelligent" waiver,' and thus in 'this context intelligence is not equated with wisdom.' " (2 LaFave, Crim. Proc. (4th ed. 2015) § 6.9(b), pp. 921-922, fns. omitted.)

"The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege. [Citations.]" (*Colorado v. Spring* (1987) 479 U.S. 564, 574.) "[A] valid waiver does not require that an individual be informed of all information 'useful' in making his decision or all information that 'might . . . affec[t] his decision to confess.' [Citation.] '[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.' [Citation.]" (*Id.* at pp. 576-577, fn. omitted; see *People v. Tate* (2010) 49 Cal.4th 635, 683.)

A waiver of *Miranda*'s protections, however, "must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception[.]' " (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 382 (*Berghuis*).) "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." (*Id.* at p. 384.)

Defendant claims that, under the totality of circumstances, his statements were the product of coercion. He asserts that the interrogation was coercive because he was questioned in a small, closed interview room at the police department by a detective who

was much larger than him and who allegedly "deceived [him] about whether he was even protected by *Miranda*" and represented that *Miranda* rights "were limited to circumstances not applicable to him." Defendant further argues that the fact that the detective confirmed that he had not threatened or beat defendant "signified [the detective's] understanding of the intimidating effect of the[ir] size difference" and that "the major difference in size under the circumstances contributed to the custodial and coercive atmosphere of the interrogation."

As defendant acknowledges, Detective Martin's tone was conversational. His questioning was cordial, matter of fact, and, at times, sympathetic. The room was well lighted, and Detective Martin offered defendant water, coffee, and soda pop, and he twice provided defendant with a cup of water. Defendant made clear that the situation, not the detective, was making him nervous. The detective did not employ intimidating body language. There was no evidence that Detective Martin subjected defendant to coercion that would render defendant's implied waiver of his *Miranda* rights involuntary.[8]

"Law enforcement officers are not required to obtain an express waiver of a suspect's *Miranda* rights prior to a custodial interview. [Citation.]" (*Cunningham*, *supra*, 61 Cal.4th at p. 642; see *Berghuis*, *supra*, 560 U.S. at p. 385.) "No particular manner or form of *Miranda* waiver is required, and a waiver may be implied from a defendant's words and actions. (*North Carolina v. Butler* (1979) 441 U.S. 369, 373-375; *People v. Whitson* (1998) 17 Cal.4th 229, 246-250.)" (*Davis*, *supra*, 46 Cal.4th at p. 585.)

Under the totality of circumstances, defendant impliedly waived his *Miranda* rights.

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[8] Coercive police conduct is a necessary predicate to finding that a statement is involuntary, and, in addition, "[a] confession is involuntary only if the coercive police conduct at issue and the defendant's statement are causally related. [Citations.]" (*People v. Cunningham* (2015) 61 Cal.4th 609, 643 (*Cunningham*).)

B. *Evidence Code Section 1108*

1. *Procedural Background*

Defendant brought a written motion in limine to exclude evidence of prior uncharged sexual misconduct on multiple grounds, including the ground that it was unduly prejudicial under Evidence Code section 352. The motion described the evidence sought to be excluded as follows: "The alleged incident occurred on Monday, July 2, 2007 when [defendant] was a camp counselor at the [church] summer camp. [Defendant] was in the pool with children under the supervision of two lifeguards. One of the lifeguards reported that she felt [defendant] was too close to a young girl who had her back against [his] chest. [Defendant] was alleged to have exited the pool with an erection, and subsequently heard masturbating in the bathroom. The incident was not reported to the police or Child Protective Services. [Defendant] was never prosecuted." (Fns. & emphasis omitted.) Defendant's pretrial motion did not seek to exclude evidence that a female camper sat in his lap.

The trial court ruled that the evidence was far more probative than prejudicial and that it was admissible under Evidence Code section 1108.

Toward the end of the trial, Evidence Code section 1108 was again raised when defense counsel objected to the court giving an instruction pursuant to CALCRIM No. 1191 (Evidence of Uncharged Sex Offense). The court stated that it was "not sure" that the evidence satisfied Evidence Code section 1108 and, therefore, the court would not give the instruction. Contrary to defendant's assertion on appeal, the jury was not instructed pursuant to CALCRIM No. 1191. Rather, the jury was instructed pursuant to CALCRIM No. 375 (Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.).[9]

[9] The court instructed the jury that the evidence of defendant's uncharged conduct at the day camp could be considered, if proved by a preponderance of the evidence, for (continued)

2. *Analysis*

On appeal, defendant contends that the trial court abused its discretion by ruling before trial that the evidence of the uncharged conduct was more probative than prejudicial and, therefore, admissible under Evidence Code section 1108. He asserts that the evidence merely showed a child sat on his lap and it did not show that he had the child sit on his lap for the purpose of sexual gratification. Defendant also asserts that, unlike the charged offenses in *People v. Villatoro* (2012) 54 Cal.4th 1152 (*Villatoro*), there was no striking similarity between his uncharged conduct at the day camp and the charged offenses.

Section 1108, subdivision (a), provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." "[T]he clear purpose of section 1108 is to permit the jury's consideration of evidence of a defendant's propensity to commit sexual offenses." (*Villatoro*, *supra*, 54 Cal.4th at p. 1164.) "A court deciding whether evidence of one or more sexual offenses meeting the definitional requirements of Evidence Code section 1108 should nonetheless be excluded pursuant to Evidence Code section 352 undertakes a careful and specialized inquiry to determine whether the danger of undue prejudice from the propensity evidence substantially outweighs its probative value." (*People v. Merriman* (2014) 60 Cal.4th 1, 41.)

"In deciding whether to exclude evidence of another sexual offense under section 1108, 'trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of

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only the limited purpose of deciding whether defendant acted with the specific intent required to prove the charged offenses and jurors could not conclude from that evidence that defendant had a bad character or was disposed to commit crime.

confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.' [Citation.] Like any ruling under section 352, the trial court's ruling admitting evidence under section 1108 is subject to review for abuse of discretion. [Citations.]" (*People v. Story* (2009) 45 Cal.4th 1282, 1295.)

In *Villatoro*, the case cited by defendant, the trial court's instruction "permitted the jury to use evidence of defendant's guilt of one of the charged sexual offenses as evidence of his propensity to commit the other charged sexual offenses." (*Villatoro*, *supra*, 54 Cal.4th at p. 1158.) The Supreme Court concluded that "any error in failing to conduct [an Evidence Code section 352] analysis was harmless. [Citation.]" (*Id.* at p. 1168.) It reasoned: "[A]lthough the victims' accounts of their respective attacks had minor differences, their versions were strikingly similar in various respects. Defendant forced or lured each woman into his car and drove to a residential area, where he forced each woman to submit to sexual acts by pointing a weapon at them. He yelled at each victim not to look at him, and afterwards ordered each out of his car. The evidence was highly probative of defendant's propensity to commit such crimes, and its value substantially outweighed any prejudice." (*Id.* at pp. 1168-1169.) *Villatoro* did not impose a mandatory requirement that there be a "striking similarity" between evidence of a sexual offense offered as propensity evidence and the charged offense.

Defendant argues that the "uncharged conduct involved no reported touching." The uncharged conduct that defendant sought to exclude before trial may not have been reported to authorities, but it did involve his touching of a young girl. "The crime of a lewd or lascivious act upon a child requires a touching of a child under the age of 14 with the specific intent 'of arousing, appealing to, or gratifying the lust, passions, or sexual

desires' (§ 288, subd. (a)) of the defendant or the child." (*Davis*, *supra*, 46 Cal.4th at p. 606.) " '*Any* touching of a child under the age of 14 violates this section, even if the touching is outwardly innocuous and inoffensive, if it is accompanied by the *intent* to arouse or gratify the sexual desires of either the perpetrator or the victim.' [Citation.]" (*People v. Shockley* (2013) 58 Cal.4th 400, 404.) A "sexual offense" within the meaning of Evidence Code section 1108 includes conduct proscribed by section 288 (lewd or lascivious act upon a child). (Evid. Code, § 1108, subd. (d)(1).)

The evidence of defendant's uncharged conduct at the day camp that defendant sought to exclude permitted the inference that defendant became sexually aroused when he held a young girl against his body, which in turn permitted an inference of his intent in so holding her.[10] (See *People v. Benavides* (2005) 35 Cal.4th 69, 97 [requisite specific intent for a lewd and lascivious act upon a child may be proven by circumstantial evidence including the nature of the act itself].) Such evidence, if proven at trial, and the inferences there from would be probative of defendant's propensity to commit lewd or lascivious acts upon young girls. Defendant did not identify any undue prejudice that would result from admission of that uncharged conduct. The uncharged conduct was not particularly inflammatory, and it was certainly less inflammatory than the evidence of the charged offenses.

"For purposes of [an Evidence Code] section 352 analysis, evidence is unduly prejudicial if it tends to create an emotional bias against a defendant that could inflame the jury, while also having a negligible bearing on the issues. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1091-1092.)" (*People v. Lucas* (2014) 60 Cal.4th 153, 268, disapproved on another ground in *People v. Romero* (2015) 62 Cal.4th 1, 43, fn. 19.) Ordinarily, "the

[10] It is generally up to a jury to decide whether the prosecution has proved by a preponderance of the evidence that the defendant in fact committed an uncharged sex offense. (See CALCRIM No. 1191.)

test for prejudice under Evidence Code section 352 is not whether the evidence in question undermines the defense or helps demonstrate guilt, but is whether the evidence inflames the jurors' emotions, motivating them to use the information, not to evaluate logically the point upon which it is relevant, but to reward or punish the defense because of the jurors' emotional reaction. (*People v. Doolin* [(2009)], 45 Cal.4th [390,] 439.)" (*People v. Valdez* (2012) 55 Cal.4th 82, 145.) " 'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]' (*People v. Farmer* (1989) 47 Cal.3d 888, 912.)" (*People v. Zapie*n (1993) 4 Cal.4th 929, 958.)

We conclude that the trial court acted within its discretion in ruling before trial that the evidence sought to be excluded by defendant was admissible under Evidence Code section 1108.

Furthermore, even if that ruling constituted error, it was harmless. Defendant admitted to Detective Martin that he touched the buttocks of a female, seven-year-old camper, who regularly sat in his lap at the church day camp. Evidence of his uncharged conduct at the church day camp was relevant and admissible to prove the requisite specific intent for the charged offenses (see Evid. Code, §§ 210, 351, 1101, subd. (b)). The jury was specifically instructed that it could not use the evidence of the uncharged conduct at the church day camp as propensity evidence. In addition, the jury was properly instructed that it could consider evidence of his charged conduct, if proved beyond a reasonable doubt, as propensity evidence.[11] (See *People v. Villatoro*, *supra*, 54 Cal.4th at p. 1162 ["in authorizing the jury's use of propensity evidence in sex offense

[11] The trial court instructed the jury that the charged offenses proved beyond a reasonable doubt could be considered as evidence of propensity.

cases, section 1108 necessarily extends to evidence of *both* charged and uncharged sex offenses"].)

C. *Cumulative Error*

Defendant asserts that, even if the alleged errors are not individually prejudicial, their cumulative effect rendered his trial fundamentally unfair and requires reversal of the judgment. We reject this claim since there is no error or prejudice to cumulate.

DISPOSITION

The judgment is affirmed.

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ELIA, ACTING P.J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.

The People v. Woodhouse
H040443